

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 17, 2006 Session

IN RE AUSTIN S.

**Appeal from the Juvenile Court for Rutherford County
No. 1933C Donna Scott, Judge**

No. M2005-01839-COA-R3-JV - March 24, 2006

This appeal involves the custody of an eight-year-old child. The Rutherford County Juvenile Court initially granted the parents equal custody. However, after the child was diagnosed with Attention Deficit Hyperactivity Disorder, the child's mother filed a petition asserting that a material change of circumstances existed and that she should be designated the child's primary residential parent. The child's father agreed that the circumstances had changed and also sought to be designated as the child's primary residential parent. Following a bench trial, the juvenile court found that a material change of circumstances had occurred and that the child's interests would be best served by designating the father as the child's primary residential parent. The mother has appealed. We affirm the juvenile court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

Stephen W. Pate, Murfreesboro, Tennessee, for the appellant, Amanda M.

M. Keith Siskin, Murfreesboro, Tennessee, for the appellee, Kevin S.

OPINION

I.

Austin S. was born out of wedlock on September 6, 1997 to Amanda M. and Kevin S. Initially, the child lived exclusively with his mother. However, after Kevin S.'s parentage was established in the Rutherford County Juvenile Court, Kevin S. began exercising regular visitation with his son. In October 2000, Kevin S. filed a petition seeking primary custody of Austin S. He asserted that he had been keeping Austin S. approximately eighteen days per month because Amanda M. regularly failed to pick Austin S. up on schedule. Although the court did not grant Kevin S.'s petition, the parties entered into an agreed order on April 9, 2001 giving them joint custody. The parties agreed that their son would reside with them on alternate weeks and that they would have joint decision-making power regarding their son's major life decisions. Neither party was required to pay child support.

In June 2004, Amanda M. filed a petition to modify the existing custody arrangement. She asserted that Austin S. had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), that he had been certified as developmentally delayed, and that he was having difficulties in school. She asserted that these materially changed conditions required that she be designated as Austin S.'s primary residential parent because the existing custody arrangement did not provide sufficient stability.

Kevin S. responded to Amanda M.'s petition by agreeing that a material change of circumstances had occurred. He also asserted that Austin S. would benefit from a more stable environment and that he was comparatively better suited to be the primary residential parent. To support his claim, Kevin S. asserted that Amanda M. did not have stable housing, that she had failed to administer their son's medication properly or to assist him with his school work, and that she had failed to pay sufficient attention to Austin S.'s clothing and personal hygiene.

The parties presented evidence to the juvenile court in December 2004 and March 2005. On April 19, 2005, the court issued a detailed order concluding that more than one material change of circumstances had occurred and that the father was comparatively more fit to be designated as Austin S.'s primary residential parent. The trial court also gave Kevin S. the authority and responsibility to make the major decisions affecting Austin S.'s welfare. Amanda M. has appealed.

II.

THE STANDARD OF REVIEW FOR CUSTODY DECISIONS

Custody and visitation decisions are among the most important decisions that courts make. *Steen v. Steen*, 61 S.W.3d 324, 327 (Tenn. Ct. App. 2001); *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 484 (Tenn. Ct. App. 1997). Their chief purpose is to promote the child's welfare by creating an environment that promotes a nurturing relationship with both parents. *Aaby v. Strange*, 924 S.W.2d 623, 629 (Tenn. 1996).

Each parent has his or her own strengths and weaknesses, *Gaskill v. Gaskill*, 936 S.W.2d 626, 630 (Tenn. Ct. App. 1996), and it would be unrealistic to measure each parent against the standard of perfection. *Earls v. Earls*, 42 S.W.3d 877, 885 (Tenn. Ct. App. 2000); *Bush v. Bush*, 684 S.W.2d 89, 93 (Tenn. Ct. App. 1984). Therefore, custody decisions are not intended to reward parents for prior virtuous conduct or to punish them for their human frailties or past missteps. *Earls v. Earls*, 42 S.W.3d at 885; *Gaskill v. Gaskill*, 936 S.W.2d at 630. Rather, taking the parents as they presently are, the courts must pragmatically decide whether the parents will be able to share the responsibilities for raising their child or, if not, which of the two parents is comparatively more fit to take on the primary parenting role.

The courts may alter custody arrangements as required by intervening circumstances. Tenn. Code Ann. § 36-3-101(a)(1) (2005). However, recognizing the importance of stability in a child's life, a court should not alter an existing custody arrangement until (1) it is satisfied either that the child's circumstances have changed in a material way since the entry of the presently operative custody decree or that a parent's circumstances have changed in a way that affects the child's well-being, (2) it has carefully compared the current fitness of the parents to be the child's custodian, and

(3) it has concluded that changing the existing custody arrangement is in the child's best interests. Tenn. Code Ann. § 36-6-101(a)(2)(B), (C); *Kendrick v. Shoemaker*, 90 S.W.3d 566, 570 (Tenn. 2002); *Blair v. Badenhop*, 77 S.W.3d 137, 150 (Tenn. 2002).

III.

THE EXISTENCE OF A MATERIAL CHANGE IN CIRCUMSTANCES

Contrary to her assertion at trial, Amanda M. insists on appeal that a material change in circumstances warranting a re-evaluation of the April 2001 custody order has not occurred. Kevin S. responds that Amanda M. should be judicially estopped from changing her position on appeal. Whether Amanda M. is judicially estopped or not, the evidence in the record establishes beyond reasonable debate that the circumstances of both Austin S. and his parents have changed materially since 2001.

Having lost in the trial court, Amanda M. cannot now change her position on appeal for two reasons. First, we do not consider arguments that were not presented to the trial court. *Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147, 153 (Tenn. 1991); *Williamson County Broad. Co. v. Intermedia Partners*, 987 S.W.2d 550, 553 (Tenn. Ct. App. 1998). Second, she is judicially estopped from arguing the absence of a material change in circumstances on appeal because she took a diametrically opposed position at trial. *Marcus v. Marcus*, 993 S.W.2d 596, 602 (Tenn. 1999); *Webber v. Webber*, 109 S.W.3d 357, 359 (Tenn. Ct. App. 2003).

Even if Amanda M. could argue that no material change in circumstances has occurred, the argument would avail her nothing because the facts do not support it. Since the entry of the shared custody order, Amanda M. has moved six times and is currently living with a boyfriend. In addition, the parties' child has been diagnosed with ADHD,¹ and Amanda M.'s performance as a responsible caregiver has been questioned. These facts support the juvenile court's conclusion that material changes in circumstances had occurred since the April 2001 order.

IV.

AUSTIN S.'S BEST INTERESTS

Amanda M. also insists that the juvenile court erred by determining that Austin S.'s interests would be best served by designating Kevin S. as his primary residential parent. She insists that the court erred by finding that Kevin S. was comparatively more fit than she to be their son's primary residential parent. We disagree.

Based on our review of the record, we find that the facts, as found by the juvenile court, support the court's decision to designate Kevin S. as Austin S.'s primary residential parent. Kevin

¹ Amanda M. argues in her brief that although the trial court stated that several material changes in circumstances had occurred since the April 2001 order, it focused primarily on her multiple changes of residence. Accordingly, she asserts that the juvenile court's focus on the changes in residence must mean that the court disagreed that the diagnosis of ADHD constituted a material change in circumstances. This issue, however, was not before the juvenile court because Kevin S. did not contest Amanda M.'s original assertion that the ADHD diagnosis constituted a material change in Austin S.'s circumstances.

S. has married and has a stable home. Austin S. has a good relationship with the other children living in the home. Kevin S. has consistently met Austin S.'s needs and has been actively involved in Austin S.'s medical care and schooling. Amanda M. has failed to meet her burden of demonstrating that the juvenile court erred in designating Kevin S. as Austin S.'s primary residential parent.

V.

We affirm the April 19, 2005 order designating Kevin S. as Austin S.'s primary residential parent and remand the case to the juvenile court for whatever further proceedings consistent with this opinion may be required. We deny both parties' requests for attorney's fees and tax the costs of this appeal in equal proportions to Kevin S. and to Amanda M. and her surety for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., P.J., M.S.